1972

State of Utah v. Byron Schultz : Petition For Rehearing

IN THE SUPREME COU
of the
STATE OF UTA

STATE OF UTAH,

Plaintiff and Respo

vs

BYRON SHULTZ,

Defendant and

PETITION FOR

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and

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Salt Lake City, Utah
Attorney for Plaintiff and Respo

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IN THE SUPREME COURT
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STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

vs

BYRON SHULTZ

Defendant and Appellant

Case No. 12751

PETITION FOR REHEARING

Comes now the appellant in the above entitled cause and respectfully petitions this Honorable Court for a rehearing in this cause for the reasons and upon the grounds as follows:

I.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED JURY INSTRUCTION NO. 9, AND THIS COURT ERRED IN AFFIRMING THE CONVICTION OBTAINED.

II.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED JURY INSTRUCTION NO. 11, AND THIS COURT

ERRED IN AFFIRMING THE CONVICTION OBTAINED.

WHEREFORE, Petitioner prays for a rehearing in this cause, that the matter be set for further argument and that upon such rehearing th eCourt vacate its decision on file herein and for such other relief as is just.

RICHARD W. CAMPBELL
Attorney for Defendant
and Appellant
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BRIEF IN SUPPORT OF PETITION FOR REHEARING

The brief of Appellant previously filed in this case presented four points on appeal. The decision dealt with one of those points, whether entrapment as a matter of law was established at trial. Appellant does not reargue that point, or Point No. 3, that Appellant was entitled to a directed verdict on the basis of agency. The heart of the appeal and this petition is found in Appellant's requested Instruction No. 9 (agency) and No. 11 (reasonable cause). These were points 2 and 4 on appeal and neither point was considered or ruled upon in the decision.

The majority opinion cites 77-42-1, U.C.A. 1953, to the effect that errors not affecting substantial rights of parties should be ignored. *State v Seymour* 18 U.2 153, 417 P. 2d 655 was mentioned. *Seymour* states:

"There should be no dismissal of a charge, nor

> reversal of a judgment, unless there was a significant failure or abuse of due process of law, or unless there was an error or defect which it could *reasonably be supposed put the defendant at some substantial disadvantage, or had some substantial prejudicial effect upon his rights.*" (Emphasis added)

Appellant's requested Instruction No. 9 (set out in Justice Henroid's dissent) forms the basis for a logical, reasonable defense to this charge. Yet counsel could not argue this defense because the trial court refused the request and charged the jury:

> "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principles in the crime thus committed and are equally guilty thereof."

Under that instruction, the agency question was taken from the jury as a matter of law. Did this ruling have "some substantial prejudicial effect" upon appellant? Byron Shultz has now been in the State prison for over six months, the beginning of a five to life pronouncement under a statute since repealed. Would he have been acquitted if requested instruction 9 had been given? Can this court say no as a matter of law?

The consequences of the admitted act, under Judge Wahlquist's instructions, and under request No. 9 are

poles apart. Without the request, no agency argument was even possible. With it, the jury had a reasonable, substantial basis for acquittal. Yet this Court did not even rule upon the issue, other than by reference to a procedural statute.

The question of "some substantial prejudicial effect" is brought into clinical detail with request No. 11. In substance, the request states police must have "reasonable grounds" to suspect a person of trafficing in drugs before they can entrap him. This position has impeccable support, set out in appellant's brief and not challenged by the State other than by citing one obscure Federal District Court ruling.

Despite this, the opinion rendered May 4th in this case ignores the existence of the request, the trial court's ruling, and the prejudicial effect.

To briefly restate matters set out in our earlier brief:

The evidence was minimal, taking less than one day, the sale undisputed. Yet the jury took nearly 5 hours to decide the case, and two times came back without a verdict, requesting further entrapment instructions. Their concern was manifest:

> *"You mean do they have to prove he committed the crime before you give him an opportunity to commit a second crime?*

FOREMAN OLSEN: *This is it your Honor."* (Transcript Page 148).

The obvious answer to this question is No. But the

fundamental question, the one that bothered this jury *without any* instruction was whether it was proper for the police to entrap a beginner, just because he was handy. Was Byron Shultz a beginner? As a matter of law, no. As a matter of fact, he should have received a jury verdict on the question. What would the verdict be? Now, we do not know. But without doubt, if effective counsel were permitted to argue "reasonable grounds", with only four blank tablets providing those grounds, we think the result would have been different. This affects not only Byron Shultz, but any improvident man in the street.

The real issue is whether this Court will permit law enforcement agencies, and their paid informers, to *indiscriminately* solicit the performance of crime. If the answer is yes, Byron Shultz has no complaint. If the answer is other than yes, it should be defined at this time and Shultz tried within the framework of such definition.

CONCLUSION

Two important issues, each of which could have changed the verdict of the jury, were not used in the trial court's charge. Would the verdict have been different? Appellant says yes; this is hardly controlling. But who can say no?

Both requests, we believe, were timely, reasonable,

proper, and *essential* to the defense of Byron Shultz. A new trial should be granted with appropriate instructions on the questions of agency and reasonable grounds of suspicion.

Respectfully submitted,
Richard W. Campbell
Attorney for Appellant